No. 231.

FILED
APR 8 19
JAMES H. McKENNEY
C

Reply Brief of Mills for P. C.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 231.

Filed April 8, 1901.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG and Others,

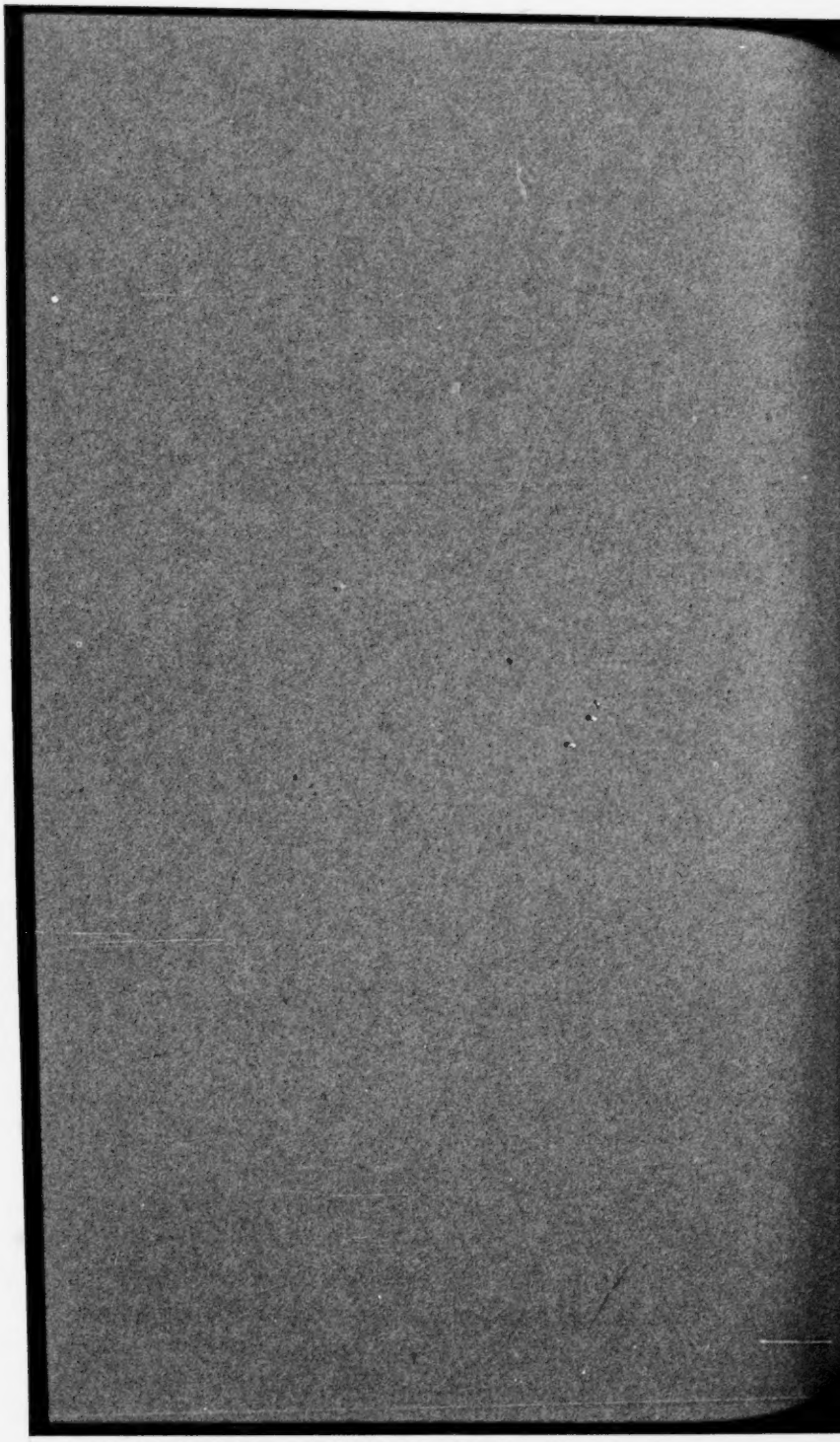
Defendants in Error.

IN ERROR TO SUPREME COURT OF NORTH DAKOTA.

REPLY BRIEF.

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.

17,691.



Supreme Court of the United States.

OCTOBER TERM, 1900.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG and Others,

Defendants in Error.

ARGUMENT IN REPLY.

The plaintiff in error begs to submit the following in reply to the argument of defendants in error:

I.

The defendant in error has called attention to Sec. 614 of the Code of Civil Procedure of North Dakota which provides in substance that the affidavit and deed in case of statutory foreclosure shall vest in the purchaser or person acquiring the title thereto, by redemption or otherwise, the same force and validity as the deed on foreclosure by action.

Section 623 provides what effect the deed in foreclosure by action shall have in the following language * * * "if the same be not redeemed, the

person or officer making the sale or his successors in office, or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of such purchaser by redemption or otherwise, a deed or deeds to such premises which shall vest in the purchaser or other party entitled thereto, the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or any time thereafter; and such deed shall be as valid as if executed by the mortgagor and mortgagee and shall be a complete bar against each of them." * * *

The language used is plain and not open to construction, it means the deed shall pass the title the mortgagor had at the date of the execution and delivery of the mortgage.

If the construction contended by defendants in error is to prevail a deed made in a foreclosure in equity would only pass what title the mortgagor had at the date of the sheriff's deed, and if the mortgagor had conveyed the land after the mortgage and prior to the deed in the foreclosure proceedings, the deed issued in such proceedings would convey no title whatever. Defendants in error's contention is so absurd and manifestly unjust that it never could have been the intention of the framers of the statute.

In the case at bar the mortgagor had the fee at the time of giving the mortgage and under the foreclosure proceedings that title was acquired by plaintiff in error and is protected by the constitution.

II.

Plaintiff in error's rights were derived under the mortgage and it has succeeded to all the rights of the mortgagee. At the date of the mortgage and at the time it was foreclosed the mortgagee had the right in foreclosure proceedings to have the premises sold and the proceeds applied to the payment of the debt, without having the value of the lot and building ascertained and the amount apportioned between the mortgagee and the lien-holders. The lien-holders could foreclose and sell subject to the mortgage, or they could sell the building and remove it.

Each lien-holder could foreclose against the property on which he held the first lien and the purchaser would acquire a title as against the subsequent lien. In order to make a clear title to the lot under foreclosure of the mechanics liens, the mortgage would have to be paid. This was the law at the time the mortgage was given and no question is made but what it so continued up to January 1st, 1896. The change in the law rendered the mortgage security less valuable; no investor can be found that would give as much for the security if it is subject to the provisions of the statute of 1895 as they would if it was only subject to the provisions of the law in force when the mortgage was given, allowing a sale and removal of the building. The value of the mortgage contract having been diminished by the statute the legislation is in conflict with the constitution under the holding in Edwards v. Kearzey, 96 U. S. 595, cited in former brief.

III.

The defendants in error have made some suggestion that as the mortgage is not contained in the record this court will not decide the question of impairment of the contract.

The record shows that Elvira Cooper and her husband executed a mortgage to the Travelers Insurance Company to secure the payment of $3,000 (Finding 1, page 20, Record) and section 4699 of the 1895 Revised Code of North Dakota defines a mortgage as follows: "Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession. A mortgage of real property can be created, renewed or extended only by writing, executed with the formalities requred in case of a grant of real property."

The record, together with the statute, shows the mortgage was a contract pledging the real estate in question for the payment of $3,000 and as shown in our first brief that it contained a power of sale permitting its foreclosure by advertisement.

That is all that is necessary to make a valid mortgage and it is unnecessary for the record to show any more, the interference with plaintiff in error's right under this contract by the construction given the statute by the Supreme Court of North Dakota is the subject of our complaint here.

IRA B. MILLS,
WILLIAM C. RESSER and
ERNEST B. MILLS,
Counsel for Plaintiff in Error.